In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-830

N. DALE ANDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied a fair trial because the government's case consisted chiefly of the testimony of witnesses immunized pursuant to 18 U.S.C. 6001-6005.

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of one count of conspiring to extort money under "color of official right" and twenty-seven counts of collection of such money, in violation of 18 U.S.C. 1951, and four counts of income tax evasion, in violation of 26 U.S.C. 7201 (Pet. 3). He was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed without opinion (Pet. App. 28).

The evidence at trial, which is not disputed here, showed that petitioner and his principal co-conspirator,

William E. Fornoff, extorted money from businessmen in connection with architectural and engineering contracts awarded by Baltimore County while petitioner was County Executive. The evidence also established that petitioner eventually received all of the extorted money and expended it for his personal use, but did not report it on his federal income tax returns.

Petitioner's claim arises because the case is one in which, as characterized by the district court, "all of the major Government witnesses in this case were implicated in some illegal activity. * * * [I]n order to obtain their testimony, the prosecution was forced to obtain for them use immunity" (Pet. App. 21). In such circumstances, petitioner asserts that the use of the immunity statute created a "structural imbalance against a criminal defendant * * * deny[ing him] the ability to present witnesses in his own defense or to have effective assistance of counsel" (Pet. 7),[1] because "he was not granted a complimentary [*sic*] right" (Pet. 2) to grant use immunity to witnesses who would testify in his behalf.

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[1]Petitioner relies largely on a suggestion by the Chief Justice (then Circuit Judge) in *Earl* v. *United States*, 361 F.2d 531, 534 n. 1 (C.A.D.C.), rehearing *en banc* denied, 364 F.2d 666, that a defendant might be denied due process if the government "secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for [a defense witness] to free him from possible incrimination to testify for [the defendant]." See also *United States* v. *Ramsey*, 503 F.2d 524, 532-533 (C.A. 7); *United States* v. *Leonard*, 494 F.2d 955, 985 n. 79 (C.A.D.C.) (opinion of Judge Bazelon); *United States* v. *Jenkins*, 470 F.2d 1061, 1063-1064 (C.A. 9), certiorari denied, 411 U.S. 920; Comment, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 Colum. L. Rev. 953 (1967).

As the district court pointed out, however, petitioner never asserted the need to obtain immunity for defense witnesses during the trial, raising that issue for the first time in his motion for a new trial (Pet. App. 19). Even then, the only indication that any such witness could have given favorable testimony appears in an affidavit by one of petitioner's counsel stating that George W. Jenkins, an officer of the J.E. Greiner Company, Inc., an engineering firm, as well as other unnamed officers of that firm, were "in a position to deny" that the firm had made any payments to Jerome B. Wolff, as part of the illegal "kickback" scheme, in return for county contracts (Pet. App. 19; affidavit of William F. Gately, attached to petitioner's "Memorandum in Support of Motion for Acquittal or in the Alternative for a New Trial").[2] Even though petitioner indicates that he knew of the possibility of this allegedly favorable testimony during the trial (Pet. 7), no request was made that Jenkins be permitted to testify under a grant of immunity.

The district court rejected on the merits petitioner's claim that he was denied a fair trial, but there is no need to reach that question here. In a similar factual situation, the Fourth Circuit in *United States* v. *Gregorio*, 497 F.2d 1253, 1264, certiorari denied, November 18, 1974, No. 74-5088, declined to consider the merits of such an argument:

> * * * If a motion to grant immunity or to require the government to grant immunity had been made to the district judge, he undoubtedly would have required defense counsel to make a proffer of the wit-

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[2]Wolff testified at trial that Jenkins had authorized a bonus payment to him to reimburse him for illegal "kickback" payments he had made to petitioner.

> ness' testimony or at least to provide some relatively precise indication of what was hoped to be proved by it. Thus, defense arguments that immunity for defense witnesses in a particular case was necessary to protect the reliablility of the trial as a mechanism for ascertaining the truth, or that the absence of defense immunity in the particular case denied the defendant a fair trial, or that defense immunity was necessary under a due process fairness principle if prosecutorial immunity was accorded, could be evaluated. In addition, profferred testimony or some equivalent substitute would provide a basis for understanding and evaluating the prosecutor's argument that, upon the subsequent trial of the defense witness, it would be impossible to prove that the government's evidence was free of taint as is required under the controlling use immunity standard. Absent profferred testimony or its equivalent, we would be required to decide these issues in a factual vacuum without the views of the district judge on the credibility and importance of the defense witness' testimony in the context of the whole case. Because the issue is not ripe for decision, we decline to explore the issue of defense immunity under the "plain error" rule.

We submit that the same principle applies here. With the exception of the profferred testimony of one individual, discussed above, petitioner never made any showing in the district court, nor does he now, of the nature of the testimony of "[a]t least fifteen (15) potentially favorable witnesses for the defense" (Pet. 10). Nor has he even

shown that they would have refused to testify. In short, petitioner's contention cannot properly be decided on appeal in a factual vacuum, whatever its merits had a grant of immunity been requested and refused at trial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.